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No. 90-1816

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MSM FARMS, INC., a Nebraska Corporation,

Petitioner,

vs.

ROBERT M. SPIRE, Attorney General,

Respondent.

and

EVERETT HOLSTEIN and RICHARD BARTEK,

Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF INTERVENORS IN OPPOSITION

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QUESTIONS PRESENTED

Intervenors would restate the questions presented for review as follows:

I. Did the United States District Court for the District of Nebraska and the United States Court of Appeals err as a matter of law in determining that Article XII, Section 8 of the Nebraska Constitution does not deprive Plaintiff of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

II. Did the United States District Court for the District of Nebraska and the United States Court of Appeals err as a matter of law in determining that Article XII, Section 8 of the Nebraska Constitution does not contravene the due process clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Intervenors accept the Petitioner's designation of Parties to the Proceeding in this Petition except would note to the Court that Don Stenberg has succeeded Robert M. Spire in the Office of Attorney General of the State of Nebraska.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, dated February 27, 1991, is reported at 927 F.2d 330 (8th Cir. 1991) and the Opinion of the United States District Court for the District of Nebraska, dated January 19, 1990, is unreported. Both Opinions are reprinted in the Appendix to the Petition.

JURISDICTION

The jurisdictional grounds are properly stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Article XII, Section 8 of the Nebraska Constitution. These constitutional provisions are reprinted in the Petition (see Petition for Certiorari, pp. 2-7).

STATEMENT OF THE CASE

Petitioner MSM Farms, Inc. (hereinafter "MSM"), a Nebraska corporation, commenced an action in the United States District Court for the District of Nebraska seeking declaratory injunctive relief against the Attorney General of the State of Nebraska with respect to the enforcement of the provisions of Article XII, Section 8 of the Nebraska Constitution. Article XII, Section 8 of the Nebraska Constitution prohibits non-family farm corporations from owning or operating Nebraska farm or ranch land and only permits family farm corporations to own or operate Nebraska farm or ranch land if the family farm corporation meets the definition under the constitutional provisions. That definition includes two standards, i.e., kinship of the owners and the requirement that one of the family members is "a person residing on or actively engaged in the day-to-day labor and management of the farm or ranch". Petitioner sought the declaratory injunctive relief on the basis that the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution were violated by the provisions of Article XII, Section 8. Jurisdiction of the United

States District Court for the District of Nebraska was invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 2201, and the Fourteenth Amendment.

The District Court, by Order dated February 16, 1989, permitted two farmers, i.e., Everett Holstein and Richard Bartek, to intervene as defendants. The District Court then proceeded to try this matter on a record submitted by the parties and, in a Memorandum Decision dated January 19, 1990, the District Court entered judgment for the Defendants and against the Plaintiff holding that Article XII, Section 8 did not violate either the equal protection clause or the due process clause of the Fourteenth Amendment. MSM appealed and the United States Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of the District Court. MSM has now filed a Petition for Certiorari before this Court.

REASONS FOR DENYING PETITION

The Petition does not present any grounds, nor could it, for granting a Petition for Certiorari. Pursuant to Rule 10 of the Rules of this Court, a petition should be granted only when there are "special and important reasons therefor". The Petitioner has cited none and there is no decision in conflict with another United States Court of Appeals decision nor has a state court of last resort decided any issues herein differently (and, in fact, the Nebraska Supreme Court has agreed with the decisions rendered by the two courts below herein, *see Omaha National Bank v. Spire*, 223 Neb. 209 (Neb. 1986)) and the decisions of the courts below do not conflict with any

decisions of this Court and, in fact, follow closely the line of decisions of this Court. For these reasons, the Petition filed herein should be denied.

I. THE PETITIONER HAS FAILED TO NOTE ANY SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT.

The Petitioner makes no attempt to argue what Rule 10 recognizes as the fundamental character of reasons the Court will consider in granting the Petition for Cert. There are basically no contrary court decisions which the Petitioner could cite. Furthermore, the lower courts' dispositions of both the equal protection and due process clause are totally consistent with decisions of this Court and decisions of other circuits and state courts.

A. MSM's Claims Do Not Warrant Review.

Petitioner cites no conflict in the courts on either the equal protection issue or on the due process issue – and there is none. The courts have consistently upheld state regulation of ownership of land. Indeed, regulating the ownership of land in this country is as old as the American Revolution. This Court, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) noted:

> After the American Revolution, the colonists in several states took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the colonies. See, e.g., Act of May 1779, 10 Henning's Statutes at Large 64, ch. 13, Para. 6 (1882) (Virginia statute); Divesting Act of 1779, 1775-1781 Pa Acts 258, ch 139

> (1782) (Pennsylvania statute.) *Courts have never doubted that such statutes served a public purpose.* See, e.g., *Wilson v. Iseminger*, 185 U.S. 54, 60-61, 46 L.Ed. 804, 22 S.Ct. 573 (1902); *Stewart v. Garter*, 70 Md. 242, 243, 16 A 644, 645 (Md. 1889).

Id. at 241, n.5 (emphasis supplied)

A century ago, Nebraska became the second state to prohibit aliens and non-domestic corporations from owning interests in Nebraska land and from leasing Nebraska land for periods in excess of five years. 76-402, et seq., Neb. R.R.S. 1943. The 1889 laws, together with embellishments, remain in effect today. Two years later and for a period of 70 years, Nebraska authorized real estate corporations to issue bonds for the purchase of land only if such corporations had twenty or fewer shareholders and then only if each shareholder, in his or her own right, owned at least 40 acres of land in the county of incorporation. 21-501 – 21-504 Neb. R.R.S. 1943.

North Dakota was the first state to enact legislation regulating corporate involvement in farming – and did so as early as 1933.

From 1971 through 1975, Oklahoma, Kansas, Wisconsin, South Dakota, Iowa, Minnesota, and Missouri passed legislation that prohibited corporate ownership of farmland and oftentimes corporate operation of agricultural activities, but generally provided exceptions for the 'family-farm corporation' in which some control was held by related shareholders, with some statutes providing that one or more of whom must live on and/or alternatively operate the farm. Some of these legislative measures provide exceptions to closely-held corporations, similar to

sub-chapter S corporations, where a majority of the activities of the corporation are limited to farming. 1971, Oklahoma, Okla. Stat. Ann. Title 18, 951 *et seq.*; 1975, Minnesota, Minn. Stat. 550.24; 1975, Missouri, Mo.Rev. Stat. 350.010 *et seq.*

This Court, in *Asbury Hospital v. Cass*, 326 U.S. 207 (1945) specifically upheld the North Dakota Supreme Court's ruling that North Dakota's statute which prohibited certain corporate ownership of farm land and required corporations (both domestic and foreign) who owned or held rural real estate to "dispose of the same within 10 years . . . " *Id.* at 209. In approving this state classification scheme and the requisite corporate divestment of farm land, this Court stated:

> We cannot say there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a *state policy* against the concentration of farming lands *and* corporate ownership.

Id. at 214. (Emphasis supplied)[1]

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[1] Curiously, MSM, in its Petition, makes no reference to *Asbury Hospital v. Cass* although it was one of several cases relied upon by the Eighth Circuit and the District Court. This omission is probably not inadvertent since it is extremely difficult to distinguish the basic holdings of the two cases. The North Dakota statute restricted all corporations except "cooperative corporations" which were defined in North Dakota statutes as corporations "75% of whose members or stockholders are actual farmers or residing on farms or depending principally on farming or agriculture for their livelihood . . . ". *Asbury Hospital v. Cass County*, 7 N.W.2d 438, 456 (N.D. 1943).

Likewise, as previously noted, the Nebraska Supreme Court specifically upheld Initiative 300's constitutionality in response to an attack based on both the equal protection clause and the due process clause. *Omaha National Bank v. Spire*, 223 Neb. 209 (Neb. 1986). In doing so, the Court specifically relied on the United States Supreme Court's decision in *Asbury Hospital v. Cass, supra*, and specifically cited the quote therefrom which is set forth above. MSM ignores the consistency of the lower court's decisions with these compelling precedents. Finally, and more recently, the Missouri Supreme Court has upheld the constitutionality of the Missouri statute which prohibited a corporation, other than a family farm corporation, from engaging in farming and from obtaining an interest in agricultural land. *State ex rel Webster v. Lehndorff Geneva*, 744 S.W.2d 801 (Mo. 1988). A family farm corporation was defined in a significantly similar manner as it is defined in Initiative 300 including a specification of the degree of familial affinity and the requirement that at least one of the stockholders reside on or actively operate the farm. *Id.* at 805, n.3. In upholding the constitutionality of the Missouri scheme, the Missouri Supreme Court specifically held that the statute was rationally related to a legitimate state interest in that it prevents the aggregation of farmland in large corporations to the competitive exclusion of traditional farming entities. *Id.* at 806.

In so holding, the Court made the very analysis applicable to Initiative 300:

> The effect of the statute, which forms the rational basis for the classification established, is to prevent the concentration of agricultural land, and the production of food therefrom, in the hands of business corporations to the detriment

> of traditional family units and corporate aggregations of natural persons primarily engaged in farming. Thus, large publicly held corporations are prevented from acquiring and operating large tracts of farmland.

Id. at 805.

B. The Equal Protection Issue.

The Petition for Certiorari is, at best, muddled and hard to follow. Requisite arguments to support a Petition for Certiorari are omitted and the argument that is presented is confused, political in nature, and contrary to clear precedent.

Regardless of the Petition's confusion, the Petitioner appears to argue that the Court of Appeals erroneously determined that Initiative 300 serves a legitimate state interest. However, Petitioner never specifically identifies the interest found by both courts below to have been a legitimate state interest and never then discusses why it is not a legitimate state interest. It is this very important step in the equal protection analysis that Petitioner overlooks and which then fundamentally flaws all of Petitioner's analysis.

It is likely Petitioner overlooks this issue because, as noted by both courts below, the legitimate state purpose served by Initiative 300 is so clearly the kind of state interest recognized under equal protection analysis principles. All of the legal precedent supports the purposes of Initiative 300. (See, for example, App. 6.) The conclusion of the courts below was that the purpose of Initiative 300 was to

> retain and promote family farm operations in Nebraska and . . . prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farmland by preventing the concentration of farmland in the hands of non-family corporations.

See App. 6. Although *Asbury Hospital v. Cass, supra,* clearly stands for the proposition that the prevention of the concentration of ownership of farmland in corporations is a legitimate state purpose, Petitioner makes no effort to either distinguish *Asbury Hospital* from the case at hand (probably because Petitioner cannot make any such distinction) nor does Petitioner make any argument why this Court should not follow its own precedent.

In its attack on Initiative 300, Petitioner makes several arguments that it simply failed to adduce evidence on and which therefore are not based on any evidence before this Court. For example, Petitioner argues that the cost of ownership of ranch and farmland results in Initiative 300 creating a system "in which only select and privileged families are allowed the protection of certain Nebraska laws". (Pet. Cert. 12). Petitioner can cite to no evidence in the record to support this assertion – there is none.

Petitioner is schizophrenic on what Initiative 300 does or does not do. On the one hand, Petitioner argues that "every single individual in Nebraska or the United States for that matter, are impacted by Article 12, section 8." (Pet. Cert. 8). On the other hand, Petitioner argues that Initiative 300 creates "a class of select persons who may participate in the ownership of land." (Pet. Cert. 16). Petitioner cannot have it both ways. Indeed, Petitioner is right in the first instance, i.e., Initiative 300 impacts on all

persons in the State of Nebraska. Thus, there is no equal protection violation. On the other hand, making distinctions between certain corporate ownership, as previously noted, has long withstood equal protection scrutiny.

Petitioner drops the names of two major corporations, i.e., Tyson Foods and Cargill, as legal family-owned corporations under Initiative 300. Petitioner then considers ridiculous, absurd or unconstitutional the favoring of Tyson Foods and Cargill over a little corporation made up of two individuals as involved herein. This argument clearly demonstrates the grasping at straws in which Petitioner engages in its Petition. Firstly, there is simply no evidence in this record as to the corporate make-up or ownership of either Tyson Foods or Cargill. This Court is in no position to take it on faith that they are family-owned corporations within the meaning of Initiative 300. Secondly, and more importantly, even if Tyson Foods and Cargill have a majority of stock held in one family, they would not qualify as a family farm under Initiative 300 unless one of the family members resided on the farm or was actively engaged in the day-to-day labor and management of the farm. As the lower courts noted, MSM, even if owned by family members, would, just like Tyson and Cargill, not qualify given the lack of involvement of the owners in the day-to-day operation of the farm.

Petitioner's argument also seems to imply that the only way one could enter farming is by incorporating. However, this is belied by the very data submitted by Petitioner which shows most farms don't involve incorporation. Initiative 300 merely provides that if individuals or persons decide to use the *corporate* structure then, and only then, must there be both a certain amount of

family ownership of the corporate structure and active involvement (either residence or day-to-day labor and management) of a family member in the farm operation.

Unbelievably, Petitioner proceeds to trivialize the familial relationship requirement as a requirement that individuals have nothing more than an "accident of birth" as if there is something inherently wrong with encouraging the family and family relationships. There clearly is not anything wrong with such an encouragement and this Court has determined that a state has a legitimate interest in protecting family life and values. See, for example, *Village of Belle Terre v. Borraas*, 416 U.S. 1 (1974).

In the end, there can be no question that legitimate governmental purposes can be served by treating corporations differently based on the nature of the ownership of the corporation and on whether the ownership is familial or non-familial and on whether the controlling owners are intimately involved in the operation of the farm. In fact, such differential treatment can be found in the federal tax treatment of corporations. See, for example, Sections 447 and 448 of the Internal Revenue Code.[2] The reasons for differing treatment are undoubtedly numerous. The point is they exist generally and have been so recognized. The reasons for differing treatment in the agricultural sector are no less and probably more and are just as reasonable.

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[2] The family corporation includes definitions as to degree of kinship and percentage of ownership of the stock just as does Initiative 300. See 447(d)(3).

Likewise, the Social Security Act, to the extent it requires payment of a tax to ensure retirement and disability income is a form of economic regulation which focuses the benefits of its programs, in substantial part, on members of the family. See, for example, 42 U.S.C. 402(b)(c)(d). This fostering of the family relationship and family values is clearly a legitimate purpose.

Initiative 300's focus on both the family distinction and involvement in the farm operation is a focus which finds support in express national policy encouraging preservation of the family farm and conditioning eligibility for benefits on becoming

> owner operators of not larger than family farms (or in the case of cooperatives, corporations, partnerships and joint operations in which a majority interest is held by individuals who are related by blood or marriage as defined by the Secretary, such individuals must be or will become either owners or operators of not larger than a family farm and at least one such individual must be or will become an operator of not larger than a family farm.)

7 U.S.C. Section 1922(3).

Petitioner also attacks the well-established judicial standard, followed by the lower courts, that there be a rational relationship between the legitimate state interest and the means of accomplishing that interest. In doing so, the Petitioner reveals the quintessentially political character of its own arguments. It asks this Court to superimpose on the people of Nebraska this Court's political judgment about the probabilities of success of an enacted measure. In doing so, the Petitioner articulates a new, and

heretofore never before expressed, standard for determining a rational relationship as being one in which "the means stands a better than average chance of accomplishing the task without creating separate privileged classes of people without good cause". (Pet. Cert., p.17) Firstly, Petitioner does not, nor could it, cite authority for this proposition. Secondly, what kind of Pandora's Box does this open for litigating equal protection claims? How would one determine, beforehand, that a legislative action or the acts of citizens have a "better than average" chance of solving the problem? What would an average chance be, i.e., a 50/50 chance? Petitioner's argument advances a theory that boils down to a constitutional crapshoot – or constitutional keno. Furthermore, what would constitute good cause for creating separate privileged classes of people? What Petitioner is really asking this Court to do and has already asked the lower courts to do, is to abandon precedent and become a "super legislature". This is exactly what this Court has said it will refuse to do. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). The lower courts wisely avoided the abandonment of longstanding precedent and the absurd legal trap presented by the Petitioners. As so well-stated by the Court of Appeals:

> MSM misapprehends the nature of our inquiry under the equal protection clause. It is up to the people of the State of Nebraska, not the courts, to weigh the evidence and decide on the wisdom and utility of measures adopted through the initiative and referendum process. See *Clover Leaf Creamery*, 449 U.S. at 469. Whether *in fact* the law will meet its objectives is not the question: the equal protection clause is satisfied if the people of Nebraska could rationally have

> decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land. *Id.* at 466; *Hawaii Housing Authority*, 467 U.S. at 242. See *Kadrmas*, 487 U.S. at 463.

(At App. 6-7).

C. The Due Process Claim.

The Circuit Court correctly rejected the Petitioner's belated "new" due process argument which clearly constituted an argument not raised and decided by the District Court. However, it went on to properly state that, under the circumstances of this case, the Court might be hard pressed to find a due process violation even if it had been properly raised.

The focus of MSM's belated and "new" argument is that required divestitute of land within two years after a court order requiring divestitute does not ensure the provision of just compensation and, therefore, violates the due process clause of the Fourteenth Amendment.

This argument belies the facts of this case.[3] Initiative 300 has a "grandfather" clause which allows for those corporations which are non-family farm corporations who, at the time of the passage of the initiative, engaged in acts which the initiative made unlawful – and, therefore, allowed them to retain their ownership interest. What Initiative 300 prohibits is future acquisitions by

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[3] Intervenors further join in, without repeating herein, the additional legal analysis provided by Respondent's Brief in Opposition. In short, Petitioner's argument is totally without merit.

unqualified non-family farm corporations. This "notice", prior to acquisition, surely undercuts any claim that a law violator might later have regarding a requirement that it divest itself of land or a farm operation which it knowingly obtained unlawfully. Petitioner's due process argument, while very short, seems to imply some kind of preemption argument that a state has no business regulating agricultural policy. Once again, Petitioner cites no authority for this position – because none exists. Furthermore, Initiative 300 represents as much land policy as farm policy – an area clearly within the State's police power to regulate.

CONCLUSION

Petitioner has presented this Court with absolutely no basis upon which to grant a Petition for Certiorari. The Petitioner's arguments are presented in the language and nature of political arguments. They are arguments rejected by the people of the State of Nebraska in the political arena. Petitioner does not present to this Court any legal justification for this Court to abandon its long-standing and recently affirmed precedent. There is no basis, legally or factually, for this Court to invade the right of a state and its people, to regulate corporate

involvement in farming. The Petition for Certiorari should be denied forthwith.

DATED THIS 9th day of July, 1991.

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